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No. 84-1971

In the Supreme Court of the United States

October Term, 1984

SUN OIL COMPANY,
Petitioner,

vs.

RICHARD WORTMAN and HAZEL MOORE, Individually and As Representatives of All Producers and Royalty Owners to Whom Sun Oil Company Has Made or Should Make Payment of Suspended Proceeds of Royalties Pursuant to FPC Opinions or FERC,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

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14 pp

TABLE OF CONTENTS

STATEMENT OF THE CASE 1
SUMMARY OF ARGUMENT 2
ARGUMENT 3
CONCLUSION 11

TABLE OF CASES

Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 386, 122 N.E. 378 5
Boutte v. Chevron Oil Co., 316 F. Supp. 524 (D. La. 1970) 3
Continental Oil Co. v. FPC, 378 F.2d 510 7
In Re Permian Area Rate Cases, 88 S. Ct. 1344 (1968) 7
Keaton v. Hustler Magazine, Inc., 104 S. Ct. 1473 11
Moses v. MacFerlan, 2 Burr. 1005 (King's Bench 1760) 6, 7
Phillips Petroleum Co. v. Shutts, et al., No. 84-233 ....1,2, 3, 10
Phillips Petroleum Co. v. Stahl Petroleum Co., 569 S.W.2d 480 (Tex. 1978) 2, 9
Shutts I, 222 Kan. 527, 567 P.2d 1392, cert. denied 435 U.S. 961 .....3, 4, 8, 9
Skelly Oil Co. v. FPC, 401 F.2d 726 (1968) 7
Texaco, Inc. v. FPC, 290 F.2d 149 (1961) 7
Union Pacific Ry. v. Chicago, R.I., 163 U.S. 564, 601, 16 S. Ct. 1173, 1187, 41 L. Ed. 265 (1896) 8
United Gas Improvement Co. v. Callery Properties, 382 U.S. 233, 15 L. Ed. 284, 86 S. Ct. 360 7

TABLE OF OTHER AUTHORITIES

66 Am. Jur. 2d, *Restitution and Implied Contracts,* Section 3 at 945 5

76 Am. Jur. 2d, *Trusts,* Section 196, Page 429 ..... 5, 6

K.S.A. 60-223 4

I. J. Pomeroy, *A Treatise on Equity Jurisprudence,* Section 111 at 143 (5th Ed., Symons 1941) 8

Pound, "The Progress of the Law, Equity", 33 Harvard Law Review 420 6

5 A. Scott, *Laws of Trusts,* Section 462 at 3413, 3d Edition, 1967 6

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BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

This case, except for the numbers, has essentially the same facts as *Phillips Petroleum Co. v. Shutts, et al.*, No. 84-233, decided by this court June 26, 1985.

During the 1970's, petitioner (Sun) suspended, held and used $3,843,000.00 of its royalty owners' money, which was later paid over to its royalty owners without interest. Suspensions were of the royalty owners' share (1/8th) of increases allowed by FPC rate increase schedules but not fully approved in the courts.

This class action was commenced August 30, 1979, in behalf of 3,159 of Sun's gas royalty owners whose royalties had been suspended and used without interest.

Sun's royalties were paid by virtue of oil and gas leases in six states: Texas, Oklahoma, Louisiana, New Mexico, Mississippi and Kansas.

Sun's suspensions of gas royalties were made according to *nationwide* gas price regulatory orders issued by FPC (FERC), Nos. 699, 699H, 770 and 770A.

The Kansas trial court allowed moratory or equitable interest on the suspense royalties at rates approved by FPC for repayment of the same funds to purchasers, if required. The Kansas Supreme Court affirmed.

SUMMARY OF ARGUMENT

1. Question of "minimum contacts" first raised by petitioner was settled by *Shutts II* (84-233).

2. Due process rights also have been settled by the decision in *Shutts II*.

3. Only question remaining is the "application of Kansas Law" to the claims of all plaintiff class members including nonresidents whose oil and gas leases are outside of Kansas.

4. It is not Kansas law that sets the interest rate in this case, but:

a. Interest rates were set not by laws of Kansas or other states but by rule of FPC to avoid unnecessary enrichment for use of money according to current prime bank interest rates.

b. Interest rates do not have to be reconciled as between states. The Texas *Stahl*[1] case, although allowing interest as an equitable matter, applies the Texas rate where there was no agreement, rather than the equitable rate. The only other case of other states directly in point and considering equitable interest was

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1. *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978)

Boutte v. Chevron Oil Co., 316 F. Supp. 524 (D. La. 1970), where the court held:

"In the event that the FPC approves the provisionally increased rates or any part thereof, interest shall be due and payable, at the rate finally adopted by the FPC, to the royalty owners on the difference between any increase in rate, as finally determined by the FPC and the amounts previously paid to the royalty owners."

ARGUMENT

The Sun brief was filed about a week before decision in *Shutts II* (84-233) was handed down by this court. Therefore, Sun's brief is combined and confusing as to points it attempts to make on due process, minimum contacts and full faith and credit.

The question remains in this case, just as in *Shutts II*:

"Should defendant pay interest for use of its royalty owners' suspense monies and at what rate?"

The trial court, as a part of its conclusions of law in this case, quoted from *Shutts I* (222 Kan. 527, 567 P.2d 1392, cert. denied 435 U.S. 961) as follows (Petition, A-21-22):

"5. The appellant argues this action should be brought in several different state courts. This risks inconsistent adjudications for a class which is otherwise treated alike." (Page 545.)

"6. There are questions of law and fact common to the plaintiff class." (Residents and nonresidents) (Page 546.)

"7. After reviewing K.S.A. 60-223, we hold Kansas courts can exercise jurisdiction over nonresident plaintiffs in a class action if procedural due process guarantees are met." (Page 547.)

"8. . . . A class action may be binding on nonresident plaintiffs when a 'common fund' is involved and where due process requirements are met." (Page 552.)

"11. The class is more manageable with nonresidents of Kansas included because all royalty owners were treated alike, regardless of residency, particular lease provisions or royalty agreements." (Page 556.)

"12. All of the royalty owners have a common interest in the money collected as suspense royalties." (Page 557-558.)

"13. It was the same FPC regulation that caused the suspense royalties to be collected." (Page 558.)

"14. Suspense royalties were paid out pursuant to the same FPC opinion." (Page 558.)

"15. All of the gas royalty owners have an interest in common with each other, in the equivalent of a 'common fund' to claim damages payable as interest and they have a contact with Kansas by reason of such common interest." (Page 558.)

In this case there is one key fact: for several years Sun used money owed to royalty owners all the while knowing it never owned the money. While Sun collected 8/8ths of the increased rates, the 1/8th royalty share could never belong to Sun. That royalty share, according to eventual FPC ruling, was either to go to royalty owners, or back to purchasers with interest, or part to one and part to the other. This is true regardless of whether the in-

creased rates were ultimately approved, disapproved or approved in part and disapproved in part by the FPC. Finally the rate increases were approved in part, the approval conclusively determining that from the date of application of the increased rates the gas was worth the increased amount. Therefore, there is but one question of law: does justice require Sun to pay interest for using the royalty owners' money?

Although the Kansas courts in this case specifically declined to rest their decision on any facet of a fiduciary relationship, a resulting or constructive trust theory is particularly applicable to this appropriation and commingling of money never belonging to Sun.

Clearly, where one holds legal title to property or money, the beneficial interest of which belongs to another, then a resulting trust or a constructive trust arises. (76 Am. Jur. 2d, *Trusts*, Section 196, Page 429.)

In *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 386, 122 N.E. 378, Judge Cardozo speaking for the court said:

> "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee."

The effect, of course, is to prevent unjust enrichment. (66 Am. Jur. 2d, *Restitution and Implied Contracts*, Section 3 at 945.) And see Professor Scott's definition of constructive trust, saying:

> "A constructive trust arises where a person who holds title to property is subject to an equitable duty to

convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." (5 A. Scott, *Law of Trusts*, Section 462 at 3413, 3d Edition, 1967.)

In *Pound*, "The Progress of the Law, Equity," 33 Harvard Law Review 420, the late Dean pointed to constructive trusts as a legitimate means of gaining restitution of a received benefit in order to prevent unjust enrichment.

In 76 Am. Jur. 2d, *Trusts*, Section 196 at 420, resulting trusts were described as follows:

"The doctrine of resulting trusts is a familiar one in equity jurisprudence. Broadly speaking, a resulting trust arises from the nature or circumstances of consideration involved in a transaction whereby one person thereby comes invested with a legal title but is obligated in equity to hold his legal title for the benefit of another. . ."

A resulting trust will arise despite the absence of fraud or the intent of the parties. (76 Am. Jur. 2d, Section 196 at 429.)

Since *Moses v. MacFerlan*, 2 Burr. 1005 (King's Bench 1760) it has been settled in equity jurisprudence that suit may be brought for the return of money secured for the use of another party. Clearly Sun had nothing but bare right of possession to the share of plaintiff class in the increased gas royalty payments. In *MacFerlan*, the court said:

"This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied); or extortion; or oppression; or

undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances."

The FPC did not merely require Sun to repay the same amount received, but rather ordered that if the increased rates were not allowed, the amount paid would be returnable with interest as set forth in the opinion in this case. Sun applied for the increases and accepted the terms of the FPC regulation with this precise understanding.

In accordance with the long standing rationale of *MacFerlan,* federal courts have enforced the FPC interest order in several cases, generally relying on theories of unjust enrichment. Such cases sustained the FPC order to refund with interest, saying, for example, "the imposition of interest on refunds ordered by the Federal Power Commission is not an inappropriate means of preventing unjust enrichment." *United Gas Improvement Co. v. Callery Properties,* 382 U.S. 233, 15 L. Ed. 284, 86 S. Ct. 360. See also, *Texaco, Inc. v. FPC,* 290 F.2d 149 (1961); and see *In Re Permian Area Rate Cases,* 88 S. Ct. 1344 (1968); *Skelly Oil Co. v. FPC,* 401 F.2d 726 (1968); and *Continental Oil Co. v. FPC,* 378 F.2d 510, where the gas producers argued imposing 7% interest did not adequately consider the rate of return on the funds, or was punitive. But the courts held 7% interest was reasonable and necessary to prevent unjust enrichment.

The FPC protects the rights of the producers and the purchasers when temporary increases are granted. The only ones unprotected are the royalty owners who are paid at the old rate while the producer uses the money and the purchaser's rate base for assessment of charges is at the new increased prices. In this case, use of the money by Sun was of benefit to Sun and this fact is undisputed.

Power of a court to assess interest as a means of forming an equitable remedy is settled:

> "It must not be forgotten that in the increasing complexities of modern business relations equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them." *Union Pacific Ry. v. Chicago, R.I.,* 163 U.S. 564, 601, 16 S. Ct. 1173, 1187, 41 L. Ed. 265 (1896).

Plainly, equity will not place limits on the remedies which it can grant, ". . . either with respect to their substance, their form or their extent, . . ." but will invent new remedies or modify old ones as necessitated by changing social conditions and to meet the ". . . new kinds of wrongs (which) are constantly committed." I. J. Pomeroy, *A Treatise on Equity Jurisprudence,* Section 111 at 143 (5th Ed., Symons 1941).

There is nothing in the interest statutes of the other five states involved that would not allow the Kansas court to grant equitable or moratory interest in this case. There is nothing in the interest statutes of other states involved that would not allow the granting of FPC interest where Sun has agreed to pay FPC interest to purchasers in the event of refund of the same money.

Any alleged conflict overlooks the essential basis for the suit, seeking interest as required by justice and equity. No authority has been found demonstrating Texas or Oklahoma or any other state involved takes a narrower view of that requirement.

Shutts I carefully examined the cases of Texas and Oklahoma and found there was no conflict in applying FPC interest in these Kansas cases. In fact, the Kansas court in *Shutts I* specifically found that there was an ex-

press agreement on the part of Phillips to pay royalty owners interest at FPC rates.

In *Shutts I* at Page 564, it is said:

> "We are dealing with 'suspense royalties' which never could or would belong to Phillips. This was the equivalent of a common fund which was accumulated and used by Phillips. . . Phillips was a stakeholder who retained the fund which it used for its own benefit . . . if the FPC had denied all of Phillips' rate increase applications, Phillips would have had to pay 7% and later 8%, interest to the the gas purchasers pursuant to its express agreement and corporate undertaking with the FPC. Thus, Phillips has made an express agreement, with regard to the monies accumulated in the suspense fund by Phillips, to pay 7% and later 8% interest, as ultimately determined by the FPC Opinion No. 586." (*Shutts,* Appendix 59a.)

> "Here, of course, an agreement for the payment of interest on the part of Phillips is clearly present." (*Shutts,* Appendix 60a.)

The *Stahl* case in Texas is not to the contrary. It allows interest as an equitable remedy. However, because Stahls requested only 6% interest as if there had been no agreement for interest, the higher FPC rate was not discussed.

Oklahoma has no case pertaining to the collection of interest on FPC suspense monies used by the producer.

Clearly, this is a transitory action acting upon the person of the defendant, requiring the payment of interest upon suspense royalties used by defendant and later paid out to royalty owners. The fact that the action is premised upon compensation for defendant's use of the monies, which

arose from royalties from oil and gas leases in six states, does not convert the action from one in personam to one in rem.

The applicable interest rate in this case according to 18 CFR 154.67 is 9% per annum during the periods of suspension and until September 30, 1979. Thereafter, the accumulated interest during 1980 and 1981 shall bear rates, according to FPC, at the average prime rate, compounded quarterly.

Awarding interest in this case, considering all other cases and authority involving unjust enrichment, is mandatory. Other federal cases are quoted above where awards of interest for unjust enrichment in excess of statutory rates have been allowed.

Because royalty owners should be compensated for what they lost, adherence to the statutory interest rates works a gross injustice. The money was lost during periods of rampant inflation and by simply looking at what Sun gained, such awards are shown to be inadequate.

By accepting the increases on the condition of having to repay purchasers, with interest at FPC rates, even remotely prudent practices dictate that Sun invested the money so as to yield at least 9%.

Sun's allegations that other states involved would decide the matter differently as to interest rates are not supported by the cases from other states. "The court's heavy reliance on the characterization of the law provided by Phillips (Sun) is not an adequate substitute for neutral review." (Justice Stevens Concur-Dissent, *Shutts II*, Page 16 (Slip Opinion).)

In this case, the trial court considered interest statutes in other states and held they did not apply. (Petition, A-25, 26.) The Kansas Supreme Court affirmed. (A-7, 8.)

Sun's contentions concerning statute of limitations are contrary to the decision of the Kansas Supreme Court on interest according to the U. S. Rule and also to this court's *Keaton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 56,494

RICHARD WORTMAN and HAZEL MOORE, *Appellees*, v. SUN OIL COMPANY, *Appellant*.

SYLLABUS BY THE COURT

1. OIL AND GAS—*Class Action—Issues Regarding Commonality, Due Process and Improper Interest.* The issues raised concerning commonality, due process, and improper interest are identical to, and thereby controlled by *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, 679 P.2d 1159, *cert. granted* ..... U.S. ..... (October 9, 1984).

2. APPEAL AND ERROR—*Consideration of Issue on Appeal Not Considered by Trial Court—When Proper.* An issue may be considered on appeal even though not considered by the trial court if it involves only a legal question arising from proven or admitted facts finally determinative of the case or if consideration is necessary to serve the ends of justice or to prevent a denial of a fundamental right. *State v. Puckett*, 230 Kan. 596, 640 P.2d 1198 (1982).

3. WORDS AND PHRASES—*"Mutual, Open, Running Account."* A mutual, open, running account is an account kept in writing of a connected series of debit and credit entries of reciprocal charges and allowances which the parties intend not to be considered independently but as a continuation of a related series. The statute of limitations, therefore, does not run against each item separately, but only against the balance due.

4. OIL AND GAS—*Suspense Royalties—Interest—Application of United States Rule.* The "United States Rule" is applicable to interest on suspense royalties. It provides that in applying partial payments to an interest-bearing debt, which is due, in the absence of an agreement or statute to the contrary, the payment shall be first applied to the interest due, then to principal.

5. INTEREST—*Post-judgment Interest—When Proper.* Post-judgment interest is proper on an unpaid judgment, when the sum owed is certain or can be easily ascertained by calculation at the time of judgment.

Appeal from Barber district court: CLARENCE E. RENNER, judge. Opinion filed October 26, 1984. Affirmed and remanded.

Jim H. Goering, of Foulston, Siefkin, Powers & Eberhardt, of Wichita, argued the cause, and *Gerald Sawatzky,* of the same firm, and *William C. Phelps,* of Sun Exploration and Production Company, of Dallas, Texas, were with him on the briefs for the appellant.

W. Luke Chapin, of Chapin & Penny, of Medicine Lodge, argued the cause, and *Ed Moore,* of Ginder & Moore, of Cherokee, Oklahoma, was with him on the brief for the appellees.

The opinion of the court was delivered by

HERD, J.: This is a class action to recover prejudgment interest on suspended gas royalties held and used by Sun Oil Company for several years. Sun appeals from the district court judgment in favor of the class.

Appellees are owners of mineral leaseholds located in Texas, Oklahoma, Louisiana, Mississippi, New Mexico and Kansas. Appellant is the lessor which produces natural

gas from each appellee's leasehold. The royalty owners seek prejudgment interest on certain gas price increases received by Sun but held in suspension for a period of time.

On several occasions during the 1960's and 1970's, the Federal Power Commission (FPC) allowed Sun to charge its purchasers increased rates for the natural gas produced from appellees' leaseholds. During the pendency of the administrative proceedings and appeals involving these price increases, Sun began receiving money at the increased rates, but did not pay the increase to its royalty owners. In order to qualify for the price increases, the FPC required Sun to enter into an undertaking which required it to refund to its purchasers any price increases which were not ultimately approved. Sun then informed its royalty owners payment of the increased price would be suspended until final approval of the increases.

The principal price increases which were the basis for the current action are set out in FPC Opinions 699, 699H, 770 and 770A. Opinion No. 586, rendered in 1968, had been decided pursuant to the FPC's "area rate approach" and involved only the Hugoton-Anadarko area which consists of all of Kansas and parts of Oklahoma and Texas. In 1974, the FPC abandoned the area rate approach in Opinion No. 699. Opinions 699, 699H, 770 and 770A set "national rates." It was during the administrative and court appeals concerning these FPC increases that Sun began to receive the increased rates on which the royalty owners now claim interest.

The price increases allowed by Opinions 699 and 699H were collected by Sun from July, 1974, through April, 1976. A total of 670 properties were involved: 43.7% from Texas, 24% from Oklahoma, 22.8% from Louisiana, 3.9% from New Mexico, 3.4% from Mississippi, and 2.1%

from Kansas. Nine hundred eighty-one interest holders were affected. The total suspended royalty under these opinions was $1,167,000. This amount was paid to the royalty owners in July, 1976.

The price increases allowed by opinions 770 and 770A were collected by Sun between December, 1976 and April, 1978. A total of 690 properties were involved: 40.3% from Texas, 31.6% from Oklahoma, 23.6% from Louisiana, 3.3% from New Mexico, 0.9% from Mississippi, and 0.3% from Kansas. One thousand three hundred fifty-three interest holders were affected. The total suspended royalty under these opinions was $2,676,000. This amount was paid to the royalty owners in April, 1978.

The royalty owners' lawsuit was filed as a class action on August 30, 1979. Notice of the lawsuit was sent by first-class mail to each royalty owner. Three thousand one hundred fifty-nine notices were mailed out. One hundred five of the class members opted out.

The trial court held prejudgment interest was due from Sun to the royalty owners on the suspended gas royalties. Post-judgment interest was also awarded. Sun Oil Company appeals.

Appellant first argues Kansas law is violated by including in the plaintiff class nonresident members who do not own Kansas leases. Sun claims such a class action fails to meet the commonality prerequisite stated in *Shutts, Executor v. Phillips Petroleum Co.*, 222 Kan. 527, 557, 567 P.2d 1292 (1977), *cert. denied* 434 U.S. 1068 (1978) (*Shutts I*): "When liability is to be determined according to varying and inconsistent state laws, the common question of law or fact preprequisite of K.S.A. 60-223(a)(2) will not be fulfilled." *Shutts I*, in which the commonality

requirement was fulfilled, pertained to three states and this case pertains to six states. The six states obviously present more variation in laws than the three; however, this case presents the same issues as those in *Shutts I*.

There are substantial facts supporting commonality in this suit which is brought for interest on suspended royalties. The difference between the two cases is merely the degree of Kansas ownership to the total. All members of the plaintiff class are royalty owners of Sun. Their royalties were suspended at the same time. Sun accumulated and used the suspended royalties of all the owners. Sun notified all royalty owners of suspension at the same time. Sun paid all the owners the suspended royalties at the same time. The FPC opinions regulated the rates of all the royalty owners. Sun kept its records and treated all royalty owners the same, regardless of residency.

Sun next argues the due process clause of the Fourteenth Amendment prohibits Kansas from asserting jurisdiction over nonresident class members who do not have "minimum contacts" with Kansas. The basis of its argument is that the United States Constitution requires the existence of a substantial relationship between a state and any individual over which the state court seeks to assert jurisdiction. *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878). Sun further argues that since *Pennoyer*, the United States Supreme Court has insisted the state asserting jurisdiction have "minimum contacts" with the party, plaintiff or defendant. See *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945), and *Shaffer v. Heitner*, 433 U.S. 186, 212, 53 L.Ed.2d 683, 97 S.Ct. 2569 (1977). Sun concludes there were no such "minimal contacts" between the nonresident plaintiffs and the State of Kansas. This issue was discussed in depth in

Shutts I. Additionally, we held in *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, Syl. ¶ 1, 679 P.2d 1159, *cert. granted* ..... U.S. ..... (October 9, 1984) (*Shutts II*):

> "While the essential element to establish in personam jurisdiction over nonresident defendants is some 'minimum contact' between the defendant and the forum state, the element necessary to the exercise of jurisdiction over nonresident plaintiff class members is procedural due process."

Sun contends this Kansas rule is incorrect and should be reversed.

Sun next maintains the trial court applied an improper interest rate to the suspended royalties. Pursuant to Sun's agreement with the FPC to refund to gas purchasers any accumulated amounts of unapproved price increases. Sun also agreed to an interest rate to be paid on those amounts. The trial court applied that agreed-upon rate to the suspended royalties. Sun argues the statutory prejudgment rate of interest of each state should instead be applied. The Court of Appeals held in *Gray v. Amoco Production Company*, 1 Kan. App. 2d 338, 341, 564 P.2d 579 (1977), *aff'd in part, rev'd in part* 223 Kan. 441 (1978), that the law of the forum pertaining to interest was applicable rather than the laws of the various states of residence of the plaintiffs. In *Shutts I*, 222 Kan. 527, Syl. ¶ 22, we stated:

> "Where a gas producer, under circumstances described in the foregoing syllabus, files a corporate undertaking with the Federal Power Commission, wherein it *agrees* to pay 7% interest on 'FPC suspense monies' until rate proceedings are determined by the commission, and 8% thereafter on the gas purchasers' share of the 'impounded' money, in the event the com-

> mission orders a refund, equitable principles require that the royalty owners receive the same treatment as to their share . . . ."

The foregoing issues concerning commonality, due process, and improper interest are identical to those raised and decided in our previous decision in *Shutts II*, 235 Kan. 195, and are almost identical to *Sterling v. Marathon Oil Co.*, 223 Kan. 686, 576 P.2d 635 (1978); *Sterling v. The Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325 (1977), *cert. denied* 434 U.S. 1067 (1978); *Maddox v. Gulf Oil Corporation*, 222 Kan. 733, 567 P.2d 1326 (1977), *cert. denied* 434 U.S. 1065 (1978); *Shutts I*, 222 Kan. 527; *Helmley v. Ashland Oil, Inc.*, 1 Kan. App. 2d 532, 571 P.2d 345, *rev. denied* 222 Kan. 749 (1977); *Gray v. Amoco Production Company*, 1 Kan. App. 2d 338.

It is interesting to note Sun Oil Company, appellant in this case, filed an *amicus* brief in *Shutts II* in opposition to the royalty owners' position there. All three issues were thoroughly discussed and decided adverse to Sun's position in that case.

Sun's reply brief in this case was filed after the decision in *Shutts II*, giving it the full benefit of that decision. Its argument here is that *Shutts II* should be reversed. Sun presented no new matter in support of this contention other than that discussed and rejected in *Shutts II*.

We have reconsidered all of Sun's arguments on the first three issues and find no reason to reverse *Shutts II*. Thus, the issues raised justify no further discussion; we merely reaffirm our previous decisions.

The next issue raised by Sun Oil is whether a portion of appellees' claim is barred by the statute of limitations. Price increases allowed by Opinion 699 and 699H were

collected by Sun from July, 1974 to April, 1976. They were paid out in July, 1976. Also in July, 1976, the FPC issued Opinion 770. Price increases from Opinion 770 and 770A were collected by Sun between December, 1976 and April, 1978, when this amount was paid. This action was filed August 30, 1979, on the theory of unjust enrichment, which is in the nature of an implied contract. Thus, the three-year statute of limitations of K.S.A. 60-512 is the period about which their argument centers. It provides:

> "The following actions shall be brought within three (3) years: (1) All actions upon contracts, obligations or liabilities expressed or implied but not in writing. (2) An action upon a liability created by a statute other than a penalty or forfeiture."

Appellant contends recovery for interest on suspense royalties paid in July, 1976, are barred by the three-year statute of limitations.

This issue was raised at trial, but the trial court made no specific ruling on it. We have held if an issue on appeal involves only a legal question arising on proven or admitted facts finally determinative of the case or if consideration is necessary to serve the ends of justice or to prevent a denial of fundamental rights, the appellate court may consider the issue even though it was not considered by the trial court. *State v. Puckett*, 230 Kan. 596, Syl. ¶ 1, 640 P.2d 1198 (1982). The issue raised by Sun of statute of limitations is a question of law. The record was uncontroverted as to when payments were made, when the opinions were issued, and when the case was filed. We conclude this is a question of law properly before this court.

The royalty owners argue the payments are not one-time transactions as contemplated by the three-year stat-

ute of limitations of K.S.A. 60-512, but rather are open accounts since each royalty owner is paid monthly for his or her share of gas produced. We defined an open account in *Spencer v. Sowers*, 118 Kan. 259, 261-62, 234 Pac. 972 (1925), as follows:

> "A mutual open, current account may be defined as an account usually and properly kept in writing, wherein are set down, by express or implied agreement of the parties concerned, a connected series of debit and credit entries of reciprocal charges and allowances, and where the parties intend that the individual items of the account shall not be considered independently but as a continuation of a related series, and that the account shall be kept open and subject to a shifting balance, as additional related entries of debits or credits are made thereto, until it shall suit the convenience of either party to settle and close the account; and where, pursuant to the original, express or implied intention, there is to be but one single and individual liability arising from such series of related and reciprocal debits and credits, which liability is to be fixed on the one party or the other as the balance shall indicate at the time of settlement or following the last pertinent entry of the account."

If an account is mutual, open and running, the statute of limitations runs on the balance of the account, thereby tolling the statute until final payment is made.

The payments made in July, 1976, by Sun, were not a part of the royalty owners' monthly payments for their share of gas produced, but were for an amount of royalty suspended for a period of time and then paid out in a lump sum to each royalty owner. Subsequent monthly royalty payments had no relationship to the July, 1976 payment

or interest thereon. We hold, therefore, the transactions between Sun and the royalty owners pertaining to interest on suspended royalty not to be a mutual, open, running account.

However, that does not dispose of this issue. We held in *Shutts I* that the "United States Rule" applies to interest on suspense royalties. The "United States Rule" provides that in applying partial payments to an interest-bearing debt which is due, in the absence of an agreement or statute to the contrary, the payment shall be first applied to the interest due, then to principal. 45 Am. Jur. 2d, Interest and Usury § 99, pp. 88-89; *Shutts I*, 222 Kan. 527; *Jones v. Nossaman*, 114 Kan. 886, 221 Pac. 271 (1923); *Christie v. Scott*, 77 Kan. 257, 94 Pac. 214 (1908). By applying the July 1976 payment under FPC Opinions 699 and 699H first to interest and then to suspended royalty, as required by the U.S. Rule, the statute of limitations issue is eliminated. The balance owed the royalty owners is royalty not interest. While interest is covered by implied contract, the payment of royalty is provided for in a written lease, which has a five-year statute of limitations pursuant to K.S.A. 60-511. This statute provides:

> "The following actions shall be brought within five (5) years: (1) An action upon any agreement, contract or promise in writing."

Thus, we conclude this action is not barred by the statute of limitations.

The final issue involves the award of post-judgment interest by the court. Sun argues the granting of post-judgment interest by the trial court in this case was improper since the exact amount of the award permitted pursuant to the court's judgment was unknown at the time of the court's final decision. The court awarded in-

terest at a set rate on each class members' accrued royalties. Thus, after the final judgment, the accrued royalties of each royalty owner had to be multiplied by the interest rate mandated by the court. This did not render the judgment so uncertain as to preclude post-judgment interest. The amount of accrued royalty for each individual and the interest rate were both known at the time of the court's judgment; to determine the exact amount owed under the court's order Sun merely had to multiply these two figures. In the other Kansas suspended royalty cases, cited previously, post-judgment interest was granted when the amounts were unknown to the same extent they are unknown in this case. This issue is without merit.

The judgment of the trial court is affirmed and the case remanded for determination of attorney fees, post-judgment interest, and entry of judgment consistent with this opinion.

HOLMES, J., not participating.

(Filed December 13, 1983)

IN THE DISTRICT COURT OF BARBER COUNTY, KANSAS

Case No. 79C40

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC Opinions or FERC,
Plaintiffs,

-vs-

SUN OIL COMPANY, a Delaware Corporation,
Defendant.

MEMORANDUM DECISION

Judgement for the plaintiff is hereby rendered in accordance with the following findings of fact and conclusions of law on this 12 day of December, 1983.

FINDINGS OF FACT

The plaintiffs in this action are Richard Wortman, who is a gas royalty owner under a Kansas oil and gas lease to whom Sun accounts for his gas royalties, and Hazel Moore, who is a gas royalty owner under an Oklahoma oil and gas lease to whom Sun accounts for her gas royalties. Both appear individually and as representatives of a class of persons defined as follows:

> "All royalty owners and overriding royalty owners to whom Sun Oil Company (Sun) made payment of

suspended royalties after August 23, 1974, through 1979, pursuant to Federal Power Commission Opinion Nos. 586, 699, 699H, 770 and 770A."

Plaintiffs will hereinafter, either individually or as representatives of a class, be referred to as "Wortman". The defendant is Sun Oil Company, hereinafter referred to as "Sun".

This class action against Sun seeks to recover interest on additional or suspense gas royalties paid by Sun at various times from and after August 23, 1974, relating to the above mentioned FPC and FERC Opinions, to its royalty owners and overriding royalty owners subsequent to approval by FPC and FERC and the courts of certain proposed rate increases on gas sales in the six states of the United States, where Sun is engaged in producing natural gas.

Both Wortman and Moore have received royalties previously suspended pursuant to one or more of the above mentioned FPC or FERC Opinions.

Sun did not pay any interest on the suspended royalties which were eventually paid to the plaintiffs and the plaintiff class pursuant to the above mentioned FPC and FERC Opinions.

Opinion No. 586 involves only the Hugoton-Anadarko area as defined by PFC and which consists of all of the State of Kansas and parts of the States of Oklahoma and Texas.

Beginning with Opinion 699, the FERC eliminated the area by area pricing scheme it had been employing and established a nation-wide rate for qualified gas. Additionally, Opinions 699, 699H, 700 and 700A set certain rates governing the sale of natural gas in interstate com-

merce. During the pendency of subsequent administrative and court appeals involving these opinions, Sun began receiving money at the increased rates set forth in these opinions but did not pay the increase out to its royalty owners.

Through the use of notice slips accompanying regular royalty checks, Sun informed the royalty owners that until final approval of the various opinions, payment of the increased proceeds would be suspended. Copies of such notices are attached, marked Exhibit 1-3.

Under Opinion 586, there were 4,727 interests paid $470,223.05; but it is believed that only about $13,000.00 has been paid since 1973, this money having been accumulated from November, 1968, through November, 1970, but not paid out to royalty owners until on or about August 28, 1978.

Under Opinion 699 and 699H, 981 interest holders nation-wide received $1,167,000.00 in suspense royalties in July, 1976, same having been accumulated from July, 1974, through April, 1976.

Under Opinions 770 and 700A there were about 1,353 interest holders, nation-wide, who received suspended royalties of about $2,676,000.00, same having been accumulated from July of 1976 through January of 1978, and paid out principally in April, 1978.

Sun has admitted that no interest was paid on proceeds held in suspense that were ultimately paid to the royalty owners.

The court has ordered that plaintiff Wortman and Moore are members of a class of approximately 2,300 members (actually, 3,159 notices were mailed by plaintiffs) of royalty owners and overriding royalty owners who